

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 581 High-Speed Rail System Surety Bonds  
**SPONSOR(S):** Ross  
**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1742 (i)

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Transportation Systems (Sub)</u>	_____	<u>Pugh</u>	<u>Miller</u>
2) <u>Transportation</u>	_____	_____	_____
3) <u>Finance &amp; Taxation</u>	_____	_____	_____
4) <u>Transportation &amp; Econ.Devel. Approps. (Sub)</u>	_____	_____	_____
5) _____	_____	_____	_____

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### SUMMARY ANALYSIS

Sections 255.05 and 337.18, F.S., generally define the purpose of surety bonds and the procedures for obtaining them. State and local governmental entities require contractors on public projects to obtain surety bonds on contracts costing more than \$100,000; for the Florida Department of Transportation, the floor is \$150,000. A surety bond is obtained for the full cost of the project contract. It protects the governmental entity, in case the contractor defaults or otherwise can not complete the project under the terms of the contract. Governmental entities also can waive the surety bond requirement if the contractor has sufficient cash, a line of credit, or other alternative form of security.

HB 581 seeks to exempt the Florida high-speed rail project from the requirements of ss. 255.05 and 337.18, F.S., because the laws do not appear to be flexible enough to address the needs of a project estimated to cost at least \$2.38 billion.

The bill creates a new section of law allowing the Florida High-Speed Rail Authority to accept a surety bond of less than 100 percent of contract costs, or accept a series of surety bonds on a phased basis, if a traditional surety bond is not commercially available.

HB 581 does not appear to raise any constitutional or other legal issues, nor does it have a tangible, immediate fiscal impact to the state.

The bill takes effect July 1, 2004.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

**STORAGE NAME:** h0581.tr.doc  
**DATE:** February 16, 2004

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. DOES THE BILL:

- |                                      |                              |                             |   |
|--------------------------------------|------------------------------|-----------------------------|---|
| 1. Reduce government?                | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes?                      | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom?        | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families?                 | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a “no” above, please explain:

#### B. EFFECT OF PROPOSED CHANGES:

##### **Background on high-speed rail project**

Florida voters in November 2000 approved a proposed constitutional amendment mandating the development of a high-speed rail system eventually linking all of the state’s urbanized areas. The measure carried 31 of Florida’s 67 counties, and the vote was 2,900,253 in favor of the amendment (52.7 percent), and 2,607,495 opposed (47.3 percent).

The amendment language, in Article X, Section 19, of the Florida Constitution, reads:

*“To reduce traffic congestion and provide alternatives to the traveling public, it is hereby declared to be in the public interest that a high speed ground transportation system of a monorail, fixed guideway or magnetic levitation system, capable of speeds in excess of 120 mph, be developed and operated in the state of Florida to provide high speed ground transportation by innovative, efficient and effective technologies consisting of dedicated rails or guideways separated from motor vehicular traffic that will link the five largest urban areas of the State as determined by the Legislature and provide access to existing air and ground transportation facilities and services. The Legislature, the Cabinet and the Governor are hereby directed to proceed with the development of such a system by the state and/or by a private entity pursuant to state approval and authorization, including the acquisition of right-of-way, the financing of design and construction of the system, as provided by specific appropriation and by law, with construction to begin on or before November 1, 2003.”*

In the three years since the amendment’s passage, a number of key events have occurred. Briefly:

- The Legislature in 2001 created the Florida High-Speed Rail Authority (FHSRA) with basic powers necessary to get started on studies and lay other groundwork to begin the high-speed rail project.
- That same year, the Legislature designated the initial segments of the high-speed rail system: between St. Petersburg, Tampa and Orlando, with future service to Miami.
- In 2002, the Legislature session broadened the Authority’s responsibilities so that it could develop a marketing plan, a detailed planning-level ridership study, and an estimate of the annual operating and maintenance costs of the high-speed rail system and other associated expenses. The FHSRA also was given the ability to: establish and collect rates, fees and other charges; acquire land and enter into leases and other contracts; and incur debt, but only in accordance with levels authorized by the Legislature. The legislation allowed the Authority to select the alignment of the high-speed rail routes within the legislatively selected urban service areas, and to prioritize the sequence of construction of each route, based on an evaluation of ridership potential, availability of local government and private-sector financing, and the availability of Authority funding.

- In November 2002, the FHSRA received the results of its Investment-Grade Ridership Study, conducted by two different consultants evaluating the same data. The study estimated that, depending on the downtown Orlando route, the first segment of the high-speed rail would attract between 1.9 million to 4.1 million passengers by the year 2010, generating between \$32.9 million and \$56 million in fare box revenues annually.
- In February 2003, the FHSRA received responses from four companies or consortia to its "Requests for Proposals" (RFPs). The entities laid out their proposals on how to design, build, operate, maintain and help finance the first segment of the high-speed rail project, linking Orlando and Tampa. Based on the four proposals, the projected total public costs, depending on the downtown Orlando route selected, ranged from \$404 million to \$2.73 billion. The projected total private costs ranged from \$944.6 million to \$2.07 billion.
- For the 2003 regular legislative session, bills with opposite approaches to high-speed rail were filed. Two bills sought to send the issue of a high-speed rail system back to the voters, who would be asked whether they supported repealing the amendment adopted in 2000. Two other bills would have further broadened the FHSRA's powers and dedicated a funding source for the initial segment. None of the bills passed the Legislature.
- However, the Governor vetoed the FHSRA's state appropriation for operating funds for FY 03-04, citing concerns about the statutory provision allowing associated development around the future high-speed rail system to be eligible for tax exemptions. The FHSRA has continued to operate by using carry-over funds and federal appropriations.
- In the summer of 2003, the FHSRA rejected two of the proposals as being non-responsive and incomplete. Left were Fluor-Bombardier and the Global Rail Consortium.
- In October 2003, the FHSRA selected Fluor-Bombardier as its preferred proposer, and began negotiations, which are continuing. Fluor-Bombardier's firm-fixed price is \$2.056 billion, according to the FHSRA's "2004 Report to the Governor and the Legislature." The FHSRA staff has estimated the actual base cost may be \$2.383 billion, when right-of-way acquisition, environmental mitigation, and other contingencies are added. These cost figures are subject to negotiation.
- The FHSRA recommended in its January, 2004 report that the Legislature approve an annual appropriation of \$75 million a year for 36 years to finance the construction of the Orlando-to-Tampa phase of the high-speed rail system. The FHSRA recommends that the sources of this dedicated funding be the Transportation Outreach Program, which is programmed to have about \$100 million a year through FY 2011-2012, and the State Transportation Trust Fund's annual allocation to public transportation programs.

The FHSRA earlier had decided that the November 1, 2003, "start of construction" specified in the state constitution can be defined as execution of a contract to complete the federally required environmental impact statement. It met that deadline, and still hopes to receive a "Record of Decision" from the federal government, granting a permit for the project, by mid-March 2004.

Meanwhile, construction of the first segment can't begin until state and/or federal funding is available. Federal legislation that includes mechanisms for funding high-speed rail construction has been filed and discussed, but has stalled. No state legislation filed so far for 2004 includes provisions for dedicated funding for high-speed rail construction.

### **Surety bonds**

Section 255.05, F.S., requires that any person entering into a contract with the state, or any local government, for the construction or repair of a public building or public work, must purchase a payment and performance bond, or "surety bond." A surety bond is conditioned upon the contractor's performance of the construction work in the time and manner prescribed in the contract, and the contractor's prompt payments to all suppliers and subcontractors.

A surety bond is a contract in which a surety company is paid a premium by a general contractor, usually, to pick up the costs of the project in the event the general contractor defaults

either as to performance of the contract or as to payment of subcontractors and suppliers. The surety bond doesn't insure the general contractor against claims such as poor workmanship; rather, it protects the public entity who hired the general contractor against the general contractor's default.

In addition, the surety bond requires the general contractor to indemnify the surety company against losses it sustains if it must perform or pay under the bonds. As an alternative to obtaining a surety bond, a general contractor may file with the state another form of security, such as cash, a certified check, or an irrevocable letter of credit to cover the cost of the contract.

For state projects where the contract does not exceed \$100,000, no surety bond is required. For state projects costing between \$100,000 to \$200,000, the state Department of Management Services may waive the surety bond requirement in lieu of other considerations, such as withholding a percentage of the phased contract payment until the project is complete.

While s. 255.05, F.S., is the general section of law regarding surety bonds, the Florida Department of Transportation (FDOT) operates under its own surety bond law, s. 337.18, F.S., because of the scope of its Five-Year Work Program and timing differences from more typical public projects. Section 337.18, F.S., states that "a surety bond shall be required of the successful bidder in an amount equal to the contract price." Under s. 337.18, F.S., FDOT is allowed to waive the surety bond requirement for contracts that don't exceed \$150,000, and has the discretion to require alternative security if the surety bond is waived. FDOT's surety bond procedures are somewhat different from those specified in s. 255.05, F.S., but the concept of surety bonds is the same.

### **Surety bonds and the high-speed rail project**

At several meetings of the FHSRA over the last two years, bond and insurance experts have testified that a project with the estimated price tag of the Orlando-to-Tampa high-speed rail system will be unable to obtain a traditional surety bond from any surety company. The FHSRA has asked its consultants to develop a list of alternatives, such as requiring surety bonds for each phase of contract work. Allowing the FHSRA to offer its rail contractor flexible options will require a change in state law.

### **Effect of HB 581**

The bill exempts the FHSRA from having to follow the surety bond procedures of ss. 255.05, and 337.18, F.S. Instead, the bill creates s. 341.843, F.S., allowing the FHSRA to require the rail contractor to provide a surety bond "in an amount determined by the (FHSRA)."

HB 581 states that the rail contractor shall provide the FHSRA a surety bond that covers 100 percent of the costs of construction. But if that level of surety is not commercially available, the FHSRA may require a money surety amount of less than 100 percent of such costs or may authorize that the bonds be provided on a phased basis. The term, "phased basis," is not defined.

The bill also specifies that the surety bond shall be payable to the FHSRA and conditioned on the contractor's performance, according to plans, specifications, and other requirements. The surety bond may be in substantially the same form as provided in s. 255.05, F.S.

As drafted, HB 581 seeks to create a solution to the problem, expressed by industry experts, that a project as costly as the high-speed rail system, will be unable to obtain a traditional surety bond that covers 100 percent of the contract price.

## **C. SECTION DIRECTORY:**

**Section 1:** Creates s. 341.843, F.S., to give the Florida High-Speed Rail Authority the ability to require either a less-than-100-percent surety bond for the contractor or contractors for the high-speed rail project, or to require surety bonds on a phased basis. Specifies that such bonds shall be from a surety company authorized to do business in the state. Specifies other conditions generally in conformity to existing state law on surety bonds.

**Section 2:** Amends s. 255.05, F.S., to specify that surety bonds for the construction of a high-speed rail system authorized by the FHSRA shall be governed by the provisions of s. 341.843, F.S.

**Section 3:** Amends s. 337.18, F.S., to specify that surety bonds for the construction of a high-speed rail system authorized by the Authority shall be governed by the provisions of s. 341.843, F.S.

**Section 4:** Specifies that this act shall take effect July 1, 2004.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

HB 581 could save upfront money for the contractor or contractors building the high-speed rail system by creating the opportunity for a flexible, phased surety bond, rather than having to augment a traditional surety bond with cash or a line of credit in order to cover the entire cost of the system.

### D. FISCAL COMMENTS:

If the FHSRA decides to require individual surety bonds for each phase of the high-speed rail construction project, rather than one bond covering 100 percent of the project, that raises a legitimate question of fiscal risk to the state if the contract defaults before completing the project. In a phased approach, and depending on the percentage of work left undone, the amount of the phased surety bond could be insufficient to cover the costs of completing the entire project. At that point, the state would have to make the decision whether to seek another contractor to finish the job.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This mandates provision is not applicable to HB 581 because the bill does not require counties or municipalities to expend local funds or to raise local funds, nor does it reduce their state revenue-sharing.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The FHSRA appears to have sufficient rulemaking authority, pursuant to s. 341.830, F.S., for project procurement that would include the issue of surety bonds.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES**